No. 06-1129

Supreme Court, U.S.
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In The

Supreme Court of the United States

SANDRA J. DAVIS, VELINA B. DUNCAN, ROSE BROWN, AND ANNETTE AMICK,

Petitioners,

v.

VALLEY HOSPITALITY SERVICES, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion, which affirms the District Court's denial of class certification on the ground that the EEOC charge did not provide adequate notice of class action claims, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion, which affirms the District Court's dismissal of Petitioners' systemic disparate treatment claims based on a lack of sufficient evidence, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

III. Whether Petitioners have presented compelling reasons to grant the petition where the Eleventh Circuit's Opinion, which affirms the District Court's dismissal of their individual disparate treatment claims, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

QUESTIONS PRESENTED – Continued

IV. Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion, which reverses the District Court's denial of summary judgment to Respondent on Petitioner Davis' failure-to-hire claim, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceeding other than those listed in the caption. There is no parent or publicly held company owning 10% or more of the stock of Valley Hospitality Services, LLC.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

No compelling reason exists to grant the Petition in this case. There is no conflict between the Eleventh Circuit's decision and a decision of any other United States Court of Appeals, a state court of last resort, or this Court. Nor has there been any departure from the accepted and usual course of judicial proceedings. Lastly, this case does not involve an important question of federal law that has not been, but should be, decided by this Court. Rather, the Petition is based on the Petitioners' dissatisfaction with the lower courts' factual findings and application of properly stated law. Accordingly, the Petition should be denied.

Petitioners assert as one of their grounds for granting the Petition that the Eleventh Circuit has failed to recognize this Court's decision in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). According to Petitioners, *Ash* held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Pet. Br. at p. 5. Petitioners miscite this Court's holding. In *Ash*, this Court held that modifiers or qualifications are not necessary in all cases to render the term "boy" probative of bias, and that the Eleventh Circuit's "slap you in the face" standard for pretext was imprecise and insufficient. The Eleventh Circuit's decision here does not conflict with the holding in *Ash*.

Petitioners further contend that the Eleventh Circuit's holding in this case conflicts with its previous holding in *Grayson v. K-Mart*, 79 F.3d 1086 (11th Cir. 1986), and with

the Sixth Circuit's holding in *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194-97 (6th Cir. 1995). In *Grayson*, the Eleventh Circuit held that it would apply the single filing rule to Age Discrimination in Employment Act ("ADEA") cases such that "a grievant who had not filed an Equal Employment Opportunity Commission ("EEOC") charge could opt into a class action by piggybacking onto a timely charge filed by one of the named plaintiffs in the class action." *Grayson*, 79 F.3d at 1101. The Eleventh Circuit further held that for a charge to have adequately alleged classwide discrimination, "there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim, and the charge must alert the EEOC that more is alleged than an isolated act of discrimination." *Grayson*, 79 F.3d at 1107 (citing *Tolliver v. Xerox Corp.*, 918 F.3d 1052, 1058 (2d Cir. 1990)) (internal quotation marks omitted). Similarly, the Sixth Circuit held in *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189 (6th Cir. 1995), that the single filing rule applies in ADEA cases and that the EEOC charge is sufficient to support piggybacking "if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed." *Id.* at 195. In this case, the District Court and the Eleventh Circuit held that the EEOC charges did not provide sufficient notice of the class action allegations. These holdings are not inconsistent with *Grayson* or *Howlett*. Rather, they are the result of the proper application of properly stated law.

Lastly, Petitioner alleges that the Eleventh Circuit's decision conflicts with this Court's decision in *Hazelwood*

School District v. United States, 433 U.S. 299 (1977). In *Hazelwood*, this Court held that

> the Court of Appeals erred in disregarding the post-Act hiring statistics in the record, and that it should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination after March 24, 1972.

Id. at 313. In this case, the Eleventh Circuit affirmed the District Court's decision denying Petitioners' systemic disparate treatment claims because it found Petitioners' evidence – both statistical and otherwise – to be clearly inadequate. Pet. Br. at p. A-11. There is no conflict between the Eleventh Circuit's decision in this case and the holding in *Hazelwood*.

The Court should therefore deny the Petition because the case does not qualify for or otherwise merit review.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petitioners Davis and Brown assert that Respondent discharged them on the basis of race and age in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"). Petitioner Amick alleges that Respondent discharged her on the basis of age in violation of the ADEA, and Petitioner Duncan alleges

that Respondent discharged her on the basis of race in violation of Title VII and Section 1981.[1]

II. STATEMENT OF FACTS

A. Respondent Takes Over The Wyndham And Discharges Petitioners Duncan And Davis.

In October 2002, Respondent, a hotel and food service management company, began planning to take over management of the Columbus Wyndham Hotel, a 177-room facility located in downtown Columbus, Georgia. (R-62 ¶¶ 1, 11-16.) On November 1, 2002, Respondent took full control of the Wyndham and conducted an orientation for all its employees. (R-67 p. 43; R-62 ¶ 18.) Each employee was required to complete a new employment application and submit to a drug test and a criminal background check as a condition of employment with Respondent. (R-67, p. 43, Ex. 1; R-62 ¶ 16.)

Over the next few days, Respondent reorganized the Wyndham, eliminating its eight separate departments and dividing the hotel into three functional areas: sales, finance, and general hotel operations. (R-62 ¶ 20.) Under the new structure, the sales division was managed by the Sales Director and the finance division was managed by the Vice President of Finance. (R-62 ¶ 20.) Brian A. Plemmons ("Plemmons"), the Acting General Manager, took over responsibility for general hotel operations, which were divided into two separate departments: the Rooms Department and the Food and Beverage Department. (*Id.*)

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[1] Petitioner Duncan's Amended Complaint also asserted a claim for age discrimination, but the District Court dismissed this claim because she was not over 40 at the time of her termination. (R-41.)

The Food and Beverage Department was managed by a Food and Beverage Director, Franco Brady, who reported to Plemmons and who, among other things, was responsible for overseeing the Restaurant Manager, the Executive Chef, the Banquet Manager and Room Service. (R-62 ¶¶ 21-22.)

The Rooms Department was managed by a Rooms Executive, a newly created position that was filled by Bruce Raines. (R-62 ¶ 17; R-67, pp. 93-96, 141.) Raines reported to Plemmons and was responsible for several of the duties previously assigned to the Front Desk Manager and Executive Housekeeper. In addition, he managed Reservations, Communications, the Concierge, and Security and oversaw the work of the Front Desk Supervisor, the Housekeeping Supervisor, the Bell Captain, the Laundry Supervisor, and the Maintenance Supervisor. (R-67 pp. 30, 32, 64, 67, 80-81; R-67 pp. 93-96; R-62 ¶¶ 23, 27.)

As a result of this restructuring, Respondent eliminated the Executive Housekeeper position held by Petitioner Duncan and the Front Desk Manager position held by Petitioner Davis. (R-67 pp. 93-96, 145; R-62 ¶¶ 23, 26.) Both Petitioner Duncan and Petitioner Davis were informed on November 4, 2004 that their positions were being eliminated and they were being discharged as a result. (R-67 pp. 70-71, 81-85, 90-96; R-62 ¶ 26; R-66, pp. 67, 71-72.)

The duties of the Executive Housekeeper were divided between Rooms Executive Bruce Raines and a new Housekeeping Manager position. Raines assumed the duties of budgeting, and managing the laundry department and the Housemen. The Housekeeping Manager, who reported

directly to Raines, supervised the housekeeping staff and maintained their schedules. (R-62 ¶¶ 27, 29-30.) Veronica Williams, an African American supervisor in the protected age group who had worked at the Hotel for several years, transferred into the newly-created Housekeeping Manager position. (R-67 pp. 76, 82, 84-87; R-62 ¶ 31.) Unlike the Executive Housekeeper, Ms. Williams did not have any authority over the Laundry. Instead, Respondent created a new Laundry Supervisor position that reported to the Rooms Executive. That position was filled by Ruby Hicks, a long-time African American employee who, like Ms. Williams, was well over 40. (R-67 pp. 76-81; R-62 ¶¶ 29, 32.)

The Front Office Manager duties were divided between Raines and a newly-created Front Desk Supervisor position. (R-66, pp. 99-101, 156; R-62, ¶¶ 23-24, 27-28.) Unlike the Front Office Manager, the Front Desk Supervisor reported to the Rooms Executive and was only responsible for supervising the Front Desk and the Front Desk Clerks. The new Front Desk Supervisor did not supervise the Bell Captain and was not responsible for Reservations, Communications or Security. (R-62, ¶¶ 27-28.) The Front Desk Supervisor also earned substantially less than the Front Office Manager. (R-62, ¶ 30.)

Michael Sabbs, an African American, was selected to fill the lower-level Front Desk Supervisor position. He held that position for two days before his drug screening test results came back positive and he was discharged on November 6, 2002. (R-62, ¶ 33.) Sabbs was replaced by Amanda Fox, a twenty-four-year-old white female who transferred to the Wyndham from another of Respondent's hotels. (R-62, ¶ 34.)

During the reorganization of the Wyndham, a number of lower-level supervisory positions were created, and some previously-existing management and supervisory positions were retained. Many of these positions were filled by minorities and those over the age of 40, including Laundry Supervisor Ruby Hicks (African American, over 40); Bell Captain Eric Bellamy (African American, over 40); Banquet Captain Janta Marshall (African American, over 40); Banquet Manager Birgit Johnson (white, over 40); Food and Beverage Supervisor Meronica Price (African American); Human Resources Director Vickie Menza, (Asian American, over 40); Restaurant Manager Petitioner Annette Amick (white, over 40); and Director of Sales Marilyn Rivera (Hispanic, over 40). (R-67, pp. 76-81; R-62, ¶ 32, 35.)

B. Petitioner Brown Is Discharged For Performance Problems

Petitioner Brown, a Front Desk Clerk at the Wyndham, was hired by Respondent on Friday, November 1, 2002. (Brown Dep. pp. 16, 48-49, 51-52, Ex. 2; R-62 ¶¶ 15, 16.) Like other employees hired by Respondent, Petitioner Brown was subject to a 90-day probationary period. (R-64; R-62, ¶¶ 16, 18.) Respondent, however, began receiving complaints about Petitioner Brown's performance almost immediately.

In November 2002, Raines orally counseled Petitioner Brown regarding complaints he received from Hotel guests about her rude behavior towards them. (R-62 ¶ 37.) Following this counseling, Lisa Lyons-Ward, an African American attorney who frequently stayed at the Wyndham and whose organization often used the Hotel's facilities,

complained to Rooms Executive Bruce Raines and Director of Sales Marilyn Rivera about a series of incidents involving Petitioner Brown and stated that Petitioner Brown was the rudest employee she had ever encountered in any hotel. Raines personally apologized to Ms. Lyons-Ward and later reported Ms. Lyons-Ward's complaint to Plemmons. (R-62 ¶ 37; R-63, ¶¶ 1-5.) Around the same time, Plemmons learned that the Hotel's Night Auditor, Wanda Haden, had discovered that Petitioner Brown had accepted a personal check from a guest for payment of room charges in violation of Respondent's written policies and procedures. (R-62 ¶ 36.)

As a result of Petitioner Brown's failure to follow Respondent's policies and procedures, and the complaints lodged against Petitioner Brown by Hotel guests, Plemmons discharged Petitioner Brown, effective December 4, 2002. (R-62 ¶ 38; R-64, pp. 60-62.) Petitioner Brown filed an EEOC Charge on December 31, 2002 alleging that she had been discriminated against on the basis of her age and race with respect to her December 4, 2002 termination. (R-64, pp. 82-83, Ex. 5.)

C. Respondent Discharges Petitioner Amick For Poor Performance

Petitioner Amick, who was the Restaurant Manager prior to Respondent taking over the management of the Wyndham, was hired by Respondent. Under the new organizational structure, Petitioner Amick reported directly to Franco Brady ("Brady"), the new Food and

Beverage Director.[2] (R-62, pp. 56-59; R-65, ¶ 6.) Petitioner Amick was fifty-nine years old at the time Plemmons hired her. (R-65, p. 164.)

Under Respondent's management structure, Petitioner Amick was responsible for coordinating, supervising and directing all of the Restaurant's operations, including, but not limited to: responding to guest complaints; ensuring compliance with health and sanitation regulations; hiring, supervising, training, and scheduling the restaurant and room service staff and ensuring their compliance with the Hotel's attendance policies; maintaining the bar; maintaining high profitability and high quality product and service levels; reducing employee turnover; and maintaining revenue and payroll budgets. (R-65, p. 62, Ex. 3 and 4.) Soon after Respondent took over management of the Wyndham, Plemmons removed the bar from Petitioner Amick's duties in order to allow her to focus on improving the performance of the restaurant and room service. (R-65, 120; R-62 ¶ 40.)

Despite the reduction in her duties, Plemmons and Brady received reports that the restaurant was not functioning properly, including guest complaints about the freshness of the food and the timeliness of room service. (R-62 ¶¶ 42-44; R-65, pp. 63-67, Ex. 6.) On February 18, 2003, Brady issued Petitioner Amick a memo asking her to

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[2] Petitioner Amick first worked for the Wyndham between 1985 and 1992 when it was known as the Hilton. (R-65, pp. 33-38.) During that time period, Plemmons was the General Manager of the Hilton, and he promoted Petitioner Amick from Waitress to Restaurant Supervisor in 1988; from Restaurant Supervisor to Executive Housekeeper in 1990; and from Night Manager to Restaurant Manager in 1991. (R-65, pp. 35-38; R-62 ¶¶ 1-8.)

address several recurring issues concerning the poor attendance of her staff, the excessive use of overtime, and her failure to manage effectively. (R-65, pp. 68-72, Ex. 9.) A few days later, he also provided her with a list of concerns relating to the improper accounting procedures used by her staff. (R-65, pp. 76-82, Ex. 10.)

Petitioner Amick failed to correct any of the problems facing her department. Instead, she exacerbated the problem by taking time off from work on March 1 and 2, 2003 when the Hotel was sold out without first ensuring that the restaurant was adequately staffed. (R-65, pp. 83-85, Ex. 11.) Brady issued Petitioner Amick a series of memoranda between March 6, 2003 and April 25, 2003 delineating her deficiencies with respect to hiring, training, and supervising employees. (R-62 ¶¶ 42, 43; R-65, pp. 85-125, Ex. 12-14, 17-18, 20.) He also issued her a written disciplinary warning regarding her unacceptable performance on April 25, 2003. (R-65, 125-128, Ex. 20-21.)

On May 16, 2003, Plemmons met with Petitioner Amick and explained that Brady had reprimanded her at his direction because of the poor performance of the restaurant, including the high turnover rate among the staff, Petitioner Amick's poor leadership, and her failure to train her staff. Plemmons reiterated to Petitioner Amick that her job duties and responsibilities were reduced after Respondent took over management of the Hotel because of her poor performance and that she needed to consider whether she was going to improve her performance or whether Respondent would have to make some changes with respect to management of the restaurant. (R-65, pp. 131-132; R-62 ¶¶ 45-46.)

Between May 22 and May 29, 2003, Brady sent Petitioner Amick three more memos outlining her performance deficiencies. (R-65, pp. 135-146, Ex. 23, 25, 26.) During that same time period, he received two guest complaints regarding room service. (R-65, 22, 24.) When Petitioner Amick's performance still failed to improve, Plemmons decided to discharge her effective June 24, 2003 for failing to effectively manage the Restaurant. (R-65, pp. 147-154; R-62 ¶ 36.) Petitioner Amick accepted Respondent's offer to resign in lieu of being discharged. (R-65, pp. 157-158; R-62 ¶¶ 17, 35.) Petitioner Amick admits that Plemmons did not discriminate against her. (R-65, pp. 180-181.)

Petitioner Amick filed an EEOC Charge on September 12, 2003 alleging that she had been discharged because of her age. (R-65, 163, Ex. 30.)

III. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioners Davis and Duncan filed separate Charges of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against Respondent on November 19, 2002 asserting that they were unlawfully discharged on the basis of race. (R-31, Ex. A.) Petitioner Brown subsequently filed an EEOC Charge on December 31, 2002, making separate, individual claims of race and age discrimination against Respondent. (R-31, Ex. A.) None of the aforementioned charges contained allegations that the purported discrimination was class-wide or that claims were being asserted on behalf of anyone other than each individual charging party.

On January 27, 2003, Petitioners' counsel wrote a letter to the EEOC stating that Petitioners Davis, Duncan and Brown intended to amend the charges of discrimination they had filed, and asserting, for the first time, allegations of class-wide discrimination on the basis of race and age and individual claims of age discrimination on behalf of Petitioners Duncan and Davis. The letter was not verified, and neither Petitioners nor their counsel took any action to ensure that the charges were amended. Moreover, the EEOC never provided Respondent with notice of the purported January 27, 2003 "amendment." The EEOC issued Petitioners Davis, Duncan and Brown notices of their right to sue on July 21, 2003. (R-27, Ex. A.)

Petitioners Davis, Duncan and Brown filed the instant lawsuit on August 18, 2003. (R-1.) On February 10, 2004, the Petitioners amended their Complaint to add Petitioner Amick as a named plaintiff and to assert class claims of race and age discrimination on behalf of "approximately 40 similarly situated managers, Front Desk employees and other employees who have been terminated in their employment and discriminated in other terms and conditions of their employment on account of race and age at the Wyndham Hotel." (R-27.)

Respondent filed a motion to dismiss, *inter alia*, Petitioners' class-wide claims under the ADEA and Title VII. (R-30.) On June 10, 2004, the District Court entered an Order granting Respondent's motion to dismiss as to Petitioners' putative Title VII class action claims and Petitioner Duncan's individual age claim because she was under 40 at the time of her termination. (R-41.) On July 23, 2004, the District Court entered a second Order denying Petitioners' Motion for Class Certification on their Title VII class claims as moot. (R-42.) Petitioners filed an

Application for Interlocutory Appeal with the District Court on June 21, 2004 and an Application for Discretionary Appeal with the Eleventh Circuit on June 28, 2005. (R-43.) The Eleventh Circuit denied Petitioners' application on July 21, 2004, and the District Court denied Petitioners' application on August 17, 2004. (R-45, 46.)

Respondent filed four separate Motions for Summary Judgment seeking dismissal of Petitioners' remaining claims. (R-49, 52, 55 and 58.) On April 25, 2005, the District Court granted Respondent's Motions for Summary Judgment regarding the claims of Petitioners Duncan, Brown and Amick, but denied summary judgment on Petitioner Davis' individual claims of age and race discrimination on the grounds that Respondent failed to rehire her, a claim Petitioner Davis admits she never made. (R-85.) Respondent applied for an interlocutory appeal of the denial of summary judgment as to Petitioner Davis' claims, and its application was granted. (R-93, 100.) Petitioners Duncan, Brown and Amick also appealed the dismissal of their individual and class claims. (R-88, 97.) Petitioner Davis filed no appeal to the Eleventh Circuit.

On appeal, the Eleventh Circuit affirmed the District Court's denial of class certification and dismissal of Petitioners Duncan, Brown, and Amick's claims in an order dated November 13, 2006. (Pet. A-8 to A-13). The Eleventh Circuit held that the district court correctly dismissed Petitioners' class-wide discrimination claims because the EEOC charges did not provide notice that such claims were being asserted and a letter from Petitioner's counsel that attempted to amend the charges was ineffective as an amendment. (*Id.* at A-10). The Eleventh Circuit further held that summary judgment in Respondent's favor was properly granted on Petitioners' systemic treatment claims

because Petitioners failed to offer sufficient evidence of systemic disparate treatment. (*Id.* at A-11) Dismissal of Petitioners' disparate impact claims was affirmed because Petitioners had not identified a facially neutral policy that may have caused statistical disparities. The Eleventh Circuit also upheld the District Court's dismissal of Petitioners' individual disparate treatment claims because Petitioners Duncan and Amick did not present prima facie cases of discrimination and Petitioner Brown failed to rebut Respondent's legitimate nondiscriminatory reason for her termination with evidence of pretext. (*Id.* at A-11 to A-12).

In a separate order dated November 30, 2006, the Eleventh Circuit reversed the District Court's denial of Respondent's motion for summary judgment on Petitioner Davis' failure-to-hire claim, finding that Petitioner Davis had never asserted such a claim. (*Id.* at A-6).

Petitioners then filed the present motion for writ of certiorari.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating a "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The District Court Did Not Abuse Its Discretion in Denying Class Certification

District courts "have broad power and discretion vested in them by Federal Rule of Civil Procedure 23 with respect to matters involving certification and management of . . . class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). As a result, the denial of class certification is reviewed for abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). This highly deferential standard of review allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment. *See Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) (abuse of discretion review "presupposes a zone of choice within which the trial courts may go either way"). Accordingly, even if this Court would have certified a class, that does not mean the district court abused its discretion in declining to do so. While the denial of certification is reviewed for abuse of discretion, Petitioners must also carry the significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioners have not carried their burden because this is simply an unremarkable case in which the District Court exercised its considerable discretion under Rule 23 not to certify a class and the Eleventh Circuit upheld that decision.

The District Court did not abuse its discretion in denying class certification in this case on the ground that Petitioners did not assert class action allegations in their verified EEOC charges. First, the District Court correctly ruled that the original EEOC charges of Petitioners

Duncan and Davis did not put the EEOC or the Respondent on notice that allegations of class-wide discrimination should be investigated.

Further, the District Court properly held that because the original charges made no reference to class-wide discrimination, the letter of Petitioners' counsel, which first asserted such allegations, went beyond merely clarifying or amplifying the charges as allowed by 29 C.F.R. § 1601.12(b), and thus, was an improper amendment. *See Cheek v. W. and S. Life Ins. Co.,* 31 F.3d 497, 503 (7th Cir. 1994) (holding that amendments may not expand the scope of the allegations within a charge). Lastly, the District Court did not abuse its discretion in finding that counsel's letter, which was not verified, was ineffective to amend the charges. The Eleventh Circuit rightly affirmed the District Court's decision on this matter.

Petitioners have not demonstrated any basis warranting this Court's review of this issue. They argue, however, that their Petition should be granted because the Eleventh Circuit's opinion in this case overruled its previous precedent in *Grayson v. K-Mart*, 79 F.3d 1086 (11th Cir. 1996), and created a conflict with the Sixth Circuit's holding in *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189 (6th Cir. 1995). No such conflict has been created.

In *Grayson*, the Eleventh Circuit considered whether the single filing (a.k.a. piggybacking) rule, which had already been applied to Title VII cases, should also be applied in ADEA cases. 79 F.3d at 1093. The court held that "[t]here is no reason why piggybacking should be allowed in Title VII cases but not in ADEA cases." 79 F.3d at 1102 (citing *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). The court further held that "[t]o

serve as the basis of an ADEA class action, the underlying EEOC charge must contain allegations(s) of class-wide discrimination." *Id.* at 1107 (citing *Anson v. Univ. of Texas Health Science Ctr.*, 962 F.2d 539, 541 (5th Cir. 1992)). "To make an allegation of classwide discrimination, 'there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim," and the charge must alert the EEOC that 'more is alleged than an isolated act of discrimination.'" *Id.* (quoting *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990)). Similarly, *Howlett* holds that "a charge will be adequate to support piggybacking under the single filing rule if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed." 49 F.3d at 195.

The Eleventh Circuit's opinion in this case is consistent with both *Grayson* and *Howlett* in that it holds that the District Court's order denying class certification should be affirmed because the EEOC charges "failed to give adequate notice that an investigation of class-wide discrimination was relevant to Duncan and Brown's individual claims," and because counsel's letter attempting to amend the charges was ineffective. (Pet. at A-10.) In fact, both the District Court and the Eleventh Circuit cited *Grayson* in support of their conclusion. This case presents an instance of the application of a properly stated rule of law.

Accordingly, the District Court did not abuse its discretion in denying class certification and the Eleventh Circuit did not err in affirming this decision. Thus, Petitioners have not presented any compelling reason to grant their Petition to review the denial of class certification.

II. Petitioners' Systemic Treatment Claims Are Not Supported by the Evidence.

Before the District Court, Petitioners asserted a claim of systemic disparate treatment against Respondent. (R-27.) In support of their claim, Petitioners presented snapshots of the racial and age make-up of the management and front desk employees before and after Respondent took over the Wyndham Hotel. The District Court found this evidence to be insufficient to support the Petitioners' claims. (Pet. at A-34 to A-42).

Specifically, the District Court found the management employee snapshots to be inaccurate. (Pet. at A-37.) Petitioners omitted two African American employees, both over 40, from its after snapshot of managers employed by Respondent. (*Id.*) In addition, Petitioner represented two of the managers employed by Respondent after the take-over to be less than 40 years old at the time of their hire, when in fact they were over 40 years old at the time of hire. (*Id.*) Petitioners have asserted allegations of this same inaccurate evidence in their Petition.

Moreover, the District Court found both the management and front desk before and after snapshots to be of little probative value because Petitioners presented no evidence regarding the available labor pool or a statistical analysis of Respondent's hiring practices. (*Id.* at A-39.) Further, Petitioners offered no evidence of expected termination rates as compared to actual termination rates. (*Id.*) Nor did Petitioners present evidence of standard deviation. (*Id.*)

Acknowledging that a failure to present adequate statistical evidence is not alone fatal to a systemic disparate treatment claim, the District Court concluded that

Petitioners had simply not offered evidence that would allow a reasonable fact finder to find in their favor and entered summary judgment in Respondent's favor on this claim. (*Id.* at A-41 to A-42.) The Eleventh Circuit affirmed, holding that the Petitioners had not offered sufficient evidence to support their claim. (*Id.* at A-11.)

Petitioners now argue that the Eleventh Circuit's holding conflicts with this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). This argument is without merit. In *Hazelwood*, this Court held that statistics relating to an employer's hiring practices after the enactment of Title VII should be considered in determining whether a prima facie case of discrimination exists. *Id.* at 313. The Court also considered what workforce comparisons are relevant to a prima facie case. *Id.* at 308 (finding comparison of percentage of minority teachers to percentage of minority students as opposed to comparison of minority teachers employed to minority teachers in workforce to be erroneous). Nothing in *Hazelwood*, however, suggests that the Petitioners have submitted sufficient evidence, statistical or otherwise, to support their systemic disparate treatment claim. Moreover, the statistical evidence presented in *Hazelwood* suffers from none of the inadequacies identified by the District Court in this case.

Throughout much of the remainder of their brief, Petitioners reargue the inaccurate facts they had already submitted to the District Court and to the Eleventh Circuit and contend that they should not be forced to present expert statistical evidence because they cannot afford to hire a statistician. Petitioners actually go so far as to assert that their statistical evidence presents "almost three hundred percent racial discrimination percentage

and a staggering seven hundred and fifty percent age discrimination percentage" without once addressing the inadequacies identified by the District Court. (Pet. at p. 20.) Respondent cannot even guess how Petitioners have derived these numbers. These arguments do not present a compelling reason to grant their Petition.

III. Petitioners Did Not Present Sufficient Evidence to Support Their Individual Disparate Treatment Claims

Petitioners have presented no compelling reason that review of the dismissal of their individual discrimination claims is warranted. Respondent will address each of the Petitioners' individual claims separately below.[3]

A. Petitioner Duncan

The District Court dismissed Petitioner Duncan's individual disparate treatment claim because she did not establish a prima facie case. (Pet. at A-50.) Specifically, her prima facie case failed because the evidence showed that Petitioner Duncan was replaced by an African American woman over the age of 40 who was also qualified for the position. (*Id.*) *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Petitioner Duncan does not contest this fact in the Petition. There is no compelling reason for the Court to review this matter.

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[3] Again, Petitioner Davis did not appeal the District Court's dismissal of her individual disparate treatment claim based on her discharge. Accordingly, the dismissal of Petitioner Davis' discharge claim is not before the Court.

B. Petitioner Brown

Petitioner Brown established a prima facie case of disparate treatment before the District Court, but was unable to rebut Respondent's legitimate nondiscriminatory reason for terminating her with evidence of pretext. (Pet. at A-52 to A-54.) Petitioner Brown was terminated based on repeated complaints that she had been rude to patrons and for violating a company policy against the acceptance of personal checks for room charges. (R-62 ¶¶ 36-37, R-63 ¶¶ 1-5.) Petitioner Brown now asserts the same evidence of pretext that she asserted before the District Court. First, she states that a white employee, Amanda Fox, also accepted a check,[4] but was not fired. Petitioner Brown presents no evidence, however, that management had also received complaints that Fox was rude to customers.

As further evidence of pretext, Petitioner Brown asserts that Rooms Executive Bruce Raines stated to an employee that she had the "right look" that the hotel's management wanted. (R-69 Ex. B.) No explanation was given as to what the "right look" meant. (*Id.*) Petitioners contend that the "right look" meant young and white. (Pet. at p. 20.) Petitioners fail to point out, however, that the women to whom this statement was made were, in fact, African American. (Pet. A-20).

Petitioners argue that the District Court's failure to consider the "right look" statement as evidence of pretext is erroneous in light of this Court's recent rejection of the

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[4] Petitioner Brown actually asserts in her Petition that Fox accepted a personal check, though the evidence does not support this contention. *See* Pet. A-53-54 fn. 7. Petitioner Brown cites to no evidence in the record to support any of these contentions.

Eleventh Circuit's "slap you in the face" standard of pretext set forth in *Ash v. Tyson Foods*, 126 S. Ct. 1195, 1197, 546 U.S. 454, __ (2006). But the District Court did not employ this standard in determining whether the "right look" comment was probative of pretext. This Court in *Ash* reached no conclusions about whether the evidence in that case was sufficient to show pretext. *Id.* at 1198. Petitioners have made no convincing argument that the evidence here shows pretext. There is simply no compelling reason for the Court to review this matter.

C. Petitioner Amick

Like Petitioner Duncan, Petitioner Amick also failed to establish a prima facie case of disparate treatment because she presented no evidence that she was replaced by someone outside the protected class. (Pet. A-55.) Petitioner Amick has claimed that two women under the age of 40 were hired to replace her. As the District Court noted, however, Respondent presented credible evidence that the Restaurant Manager position Petitioner Amick held was eliminated, with Food and Beverage Director Franco Brady taking over the management of the restaurant. (*Id.*) Two younger women were hired before Petitioner Amick's termination, but no evidence was presented that these women took over Petitioner Amick's job responsibilities. (*Id.*) Accordingly, the District Court held that a prima facie case had not been established. (*Id.*) The Eleventh Circuit affirmed.

The District Court further opined that Petitioner Amick did not sufficiently rebut Respondent's evidence that she was terminated because of well-documented concerns about her performance, which included understaffing, excessive use of overtime by staff, high turnover of staff, lack of staff training,

improper accounting procedures, and issues with food quality. (Pet. A-55 to A-57.) Petitioner Amick responds to these legitimate nondiscriminatory reasons for her discharge with only her own conclusory allegations that they are false. Petitioner Amick further denies that she had responsibility for hiring staff and thus, she should not have been held responsible for issues relating to understaffing. (Pet. 13-14.). Petitioner Amick, however, had admitted in her own deposition testimony that she was responsible for hiring. (R-65 pp. 117-25; Pet. A-57 fn. 8.)

Petitioner Amick has presented no compelling reason for the Court to review this matter.

IV. Petitioner Davis Admits She Asserted No Failure-to-Hire Claim

The District Court granted Respondent's motion for summary judgment on Petitioner Davis' discriminatory discharge claim because she failed to present evidence that she was replaced by someone outside the protected class. (Pet. A-43 to A-48.) The District Court then proceeded, however, to consider whether Petitioner Davis had established a failure-to-hire claim. (*Id.*) Finding that she had, the District Court denied Respondent's summary judgment motion with respect to this one claim. (*Id.*)

Respondent filed an interlocutory appeal for the Eleventh Circuit to consider this matter. The Eleventh Circuit reversed, holding that Petitioner Davis had never raised a failure-to-hire claim. (Pet. A-6 to A-7.) Petitioner Davis has never refuted this fact. There is no compelling reason for the Court to review this matter.

CONCLUSION

The decisions below do not conflict with any decision of this Court or any Court of Appeals nor do they implicate an important federal question that has not be decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating a compelling reason for the Petition to be granted. The Petition should therefore be denied.

Respectfully submitted,

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